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SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 74-1512

JOSEPH RAYMOND VITTITOW ..... PETITIONER

VS:

COMMONWEALTH OF KENTUCKY ..... RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT TO CERTIORARI

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INDEX

Page

TABLE OF AUTHORITIES ii

STATEMENT OF QUESTIONS PRESENTED vi

OPINION BELOW 1

JURISDICTION 1-7

SUMMARY 7-8

STATUTORY PROVISIONS INVOLVED KENTUCKY REVISED STATUTES 433.220 .. 8

COUNTERSTATEMENT OF THE CASE 8-11

ARGUMENT 11-21

I. THE CIRCUMSTANTIAL EVIDENCE PRESENTED AT TRIAL BY THE PROSECUTION WAS MORE THAN SUFFICIENT TO SUPPORT THE PETITIONER'S CONVICTION OF GRAND LARCENY; THUS, NO SUBSTANTIAL CONSTITUTIONAL IS PRESENTED NOR IS THERE A CONFLICT AMONG THE VARIOUS STATE AND FEDERAL JURISDICTIONS 11

II. THE SEARCH OF THE AUTOMOBILE DRIVEN BY THE PETITIONER DOES NOT PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION PERTAINING TO HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL 15

III. PETITIONER'S DUE PROCESS RIGHTS TO A FAIR TRIAL WERE NOT VIOLATED BY THE ADMISSION INTO EVIDENCE OF PHOTOGRAPHS OF ONLY ONE SET OF BOOTPRINTS 19

CONCLUSION 22

PROOF OF SERVICE 23

TABLE OF AUTHORITIES

Page

Berea College v. Kentucky,
211 U.S. 45 (1908) 5

Bilby v. Stewart,
246 U.S. 255, 257 (1917) 2

Cardinale v. Louisiana,
394 U.S. 437 (1969) 7

Carroll v. United States,
267 U.S. 132 (1925) 18

Chambers v. Maroney,
399 U.S. 42 (1970) 18

Coolidge v. New Hampshire,
403 U.S. 443 (1971) 18

Department of Mental Hygiene v. Kirchner,
380 U.S. 194 (1965) 7

Dixon v. Duffy,
342 U.S. 33 (1951) 6

Eversole v. Commonwealth, Ky.,
288 S.W. 2d 58 (1956) 13

Faughn v. Commonwealth, Ky.,
453 S.W. 2d 743 (1970) 15

Hayes v. Hayes, Ky.,
357 S.W. 2d 863 (1962) 21

Henry v. Mississippi,
379 U.S. 443 (1965) 6

TABLE OF AUTHORITIES (Continued)

Page

Herb v. Pitcairn,
324 U.S. 117 (1945) 6

Holland v. United States,
348 U.S. 121 (1954) 13

Hollowell v. Commonwealth, Ky.,
492 S.W. 2d 884 (1973) 15

Hunt v. Commonwealth, Ky.,
338 S.W. 2d 912 (1960) 13

Iles v. Commonwealth, Ky.,
476 S.W. 2d 170 (1972) 17

Illinois Central Railway Co. v. Kentucky,
218 U.S. 551 (1904) 2

Lynch v. New York ex rel Pierson,
293 U.S. 52 (1934) 3, 17

Madden v. Kentucky,
309 U.S. 83 (1940) 6

Maryland and Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc.,
390 U.S. 367 (1970) 5

Missouri Pacific Railroad Co. v. Hanna,
266 U.S. 184 (1924) 4

Murdock v. Memphis,
20 Wall 590 (1875) 4

New York Central & Hudson River Railroad Co. v. New York, 186 U.S. 269 (1901) 3

TABLE OF AUTHORITIES (Continued)

Page

New York ex rel Bryant v. Zimmerman,
278 U.S. 63 (1928) 3

O'Brien v. O'Brien,
294 Ky. 793, 172 S.W. 2d 595, 609 (1943) 16

Oxley Stave Co. v. Butler County,
166 U.S. 648, 655 (1897) 4

People of New York, ex rel Consolidated Water Co. of Utica v. Maltbee, 303 U.S. 158 (1938) 7

Shelton v. Commonwealth, Ky.,
484 S.W. 2d 95 (1972) 15

Southwestern Bell Telephone Co. v. State of Oklahoma, 303 U.S. 206 (1938) 6

United States v. Brown,
452 F. 2d 868 (6th Cir. 1971) 17

United States v. Gargotto,
476 F. 2d 1009 (6th Cir. 1973) 18

Webb Transfer Lines, Inc. v. Taylor, Ky.,
439 S.W. 2d 88 (1969) 21

Winn v. Commonwealth, Ky.,
303 S.W. 2d 275 (1957) 15

Wombles v. Commonwealth, Ky.,
317 S.W. 2d 169 (1958) 13

Young v. Ragen,
337 U.S. 235 (1949) 6

TABLE OF AUTHORITIES (Continued)

Page

Kentucky Statutes:
433.190 12
433.220 ..... 8, 12

State and Federal Constitution:

Bill of Rights of the
Kentucky Constitution, Section 14 16

Section 10 of the
Kentucky Constitution 16

4th Amendment to the
United States Constitution 16

14th Amendment to the
United States Constitution 16

Other Citations:
Title 28 U.S.C. § 1257(3) 1, 7, 22

Supreme Court Rule 19 ..... 7, 8

Supreme Court Rule 23(1)(f) 4

Russell's Kentucky Practice,
Vol. 1, Part 3, page 15 12

STATEMENT OF THE QUESTIONS PRESENTED

I. WHETHER THE CIRCUMSTANTIAL EVIDENCE PRESENTED AT TRIAL BY THE PROSECUTION WAS SUFFICIENT TO SUPPORT PETITIONER'S CONVICTION OF GRAND LARCENY; AND, IS THERE A CONFLICT OF DECISIONS AMONG STATE AND FEDERAL JURISDICTIONS?

II. WHETHER THE SEARCH OF THE AUTOMOBILE DRIVEN BY THE PETITIONER PRESENTS A SUBSTANTIAL CONSTITUTIONAL QUESTION PERTAINING TO PETITIONER'S FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL?

III. WHETHER PETITIONER'S DUE PROCESS RIGHTS TO A FAIR TRIAL WERE VIOLATED BY THE ADMISSION INTO EVIDENCE OF PHOTOGRAPHS OF ONLY ONE SET OF BOOTPRINTS?

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OPINION BELOW

The Opinion Below from the Kentucky Court of Appeals is a Memorandum Opinion, not to be cited as authority, and is correctly set forth in the petitioner's Appendix at page 1A of his Petition for Writ of Certiorari.

JURISDICTION

Petitioner's application to invoke the jurisdiction of this Court should be denied because it fails to meet the jurisdictional requirements of Title 28 U.S.C. § 1257(3).

The petitioner urges this Court to grant his Petition

for Writ of Certiorari to consider three issues, each of which are alleged to involve substantial federal questions. But, no federal question was ever presented to the state courts until the petitioner filed a Supplemental Petition for Rehearing in the Kentucky Court of Appeals on January 16, 1975. However, by that point in time the Kentucky Court of Appeals had already affirmed the decision of the trial court on October 28, 1974. Subsequent to that affirmance, the petitioner filed a Petition for Rehearing before the Kentucky Court of Appeals on December 12, 1974. Shortly thereafter, petitioner retained new counsel and said counsel filed a Supplemental Petition for Rehearing urging *for the first time* alleged violations of federally constitutional rights. However, the Petition for Rehearing and Supplemental Petition for Rehearing were subsequently denied and the mandate was issued on February 21, 1975. There was no change in the original opinion of the Kentucky Court of Appeals affirming the petitioner's conviction.

As this Court is aware, when a federal question appears for the first time in a petition for rehearing filed with the highest state court, that question is deemed to have been properly raised only if the state court entertains the petition *and expressly rules upon and disposes of the federal question involved. Illinois Central Railway Co. v. Kentucky,* 218 U.S. 551 (1904). That rule, of course, is the same where the federal question is raised for the first time in a second petition for rehearing before the state court. *Bilby* v. *Stewart,* 246 U.S. 255, 257 (1917).

In the instant case the petitioner did not rely upon federal grounds in the state courts until he filed his Supplemental Petition for Rehearing in the Kentucky Court of Appeals. In any event, the opinion of the Kentucky Court of Appeals previously issued was not changed or effected in any manner whatsoever. In a case such as this where it is quite clear that the federal questions now urged were presented for the first time at so late a stage in the state proceedings and the state court did not expressly dispose of those questions, then this Honorable Court is obviously without jurisdiction to consider those matters on a petition tor writ of certiorari. *Illinois Central Railway Co. v. Kentucky,* supra.

Furthermore, the mere fact that petitioner cited United States Supreme Court cases to the state court is an insufficient predicate upon which to either raise a federal question or establish jurisdiction. After all, jurisdiction cannot be founded by surmise. *Lynch v. New York ex rel Pierson,* 293 U.S. 52 (1934). In raising a federal question, it is necessary that the question be presented in the state courts in such a manner that there is no doubt that reliance is upon federal rather than state rights. See *New York Central & Hudson River Railroad Co. v. New York,* 186 U.S. 269 (1901). This Court has stated that if it is uncertain whether a claim is grounded on some provision of the State Constitution or of the Federal Constitution, it will be assumed that reference is being made to the State rather than the Federal Constitution. See *New York ex rel Bryant v. Zimmerman,* 278 U.S. 63 (1928). Here, the opinion of the Court of Appeals of Kentucky contains no specific reference to either state or federal law. However, since that opinion was rendered

on the basis of a trial record and appellate briefs reflecting no federal grounds, it must be concluded that the opinion rests solely upon adequate state grounds. Therefore, this Court has no jurisdiction to review that opinion by way of certiorari. *Murdock v. Memphis,* 20 Wall 590 (1875). *Missouri Pacific Railroad Co. v. Hanna,* 266 U.S. 184 (1924).

Also, it is interesting to note that the petitioner does not specify what stage in the proceedings of the court of first instance and in the state appellate court at which, and the manner in which, the federal questions sought to be reviewed were raised. In the case at bar, the petitioner has failed to point out or make reference to the record below in order to establish where and the manner in which he presented the federal questions he now raises. Thus, even if the petitioner had raised the federal questions in the courts below, which he did not, his failure to comply with Rule 23 (1)(f) forecloses certiorari review by this Court now. After all,

> "The jurisdiction of this Court to reexamine the final judgment of the state court cannot arise from mere inference, but only from affirmance so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right." *Oxley Stave Co. v. Butler County,* 166 U.S. 648, 655 (1897).

In any event, the issues now presented by the petitioner, even if they had been properly raised in the court below, do not constitute substantial federal questions as would invest this Court with jurisdiction. This being

so, the petition should be dismissed. *Maryland and Virginia Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 390 U.S. 367 (1970).

For instance, petitioner's first contention is whether there was sufficient evidence to support the conviction. The Kentucky Court of Appeals, in their opinion affirming petitioner's conviction, stated ". . . that the evidence was sufficient to sustain the conviction, . . ." This is hardly a matter involving a substantial federal question. Even petitioner's allegation that the law is in conflict among jurisdictions in this area is totally unfounded. Similarly, the third contention fails to reflect a question of such substantial federal magnitude as to require review by certiorari. This issue centers around whether the petitioner was prejudiced by the admission of certain photographs and a key into evidence and testimony pertaining thereto. Again, no substantial federal question is presented thereby. Petitioner's second contention as to an alleged illegal search and seizure is likewise lacking of such substance as to necessitate review by certiorari.

Furthermore, this Court has consistently adhered to the self-imposed principle that it will not review a state court judgment based upon an adequate and independent nonfederal ground even if a federal question had been properly raised. *Berea College v. Kentucky*, 211 U.S. 45 (1908). Here, the opinion of the Kentucky Court of Appeals reflects the consideration of no federal issues. In fact, no federal issues arose for the trial court's consideration nor were any federal questions presented to

the Kentucky Court of Appeals prior to the rendition of that opinion. An examination of the opinion of the Kentucky Court of Appeals reflects that it was based solely upon state grounds and was not dependent on or touching upon a substantial federal question. Under these circumstances this Court has no jurisdiction to review the decision of the Kentucky Court of Appeals upon a petition for writ of certiorari since its power over state judgments is to correct them only to the extent that the state court incorrectly adjudged federal rights. *Herb v. Pitcairn,* 324 U.S. 117 (1945); *Dixon v. Duffy,* 342 U.S. 33 (1951); *Young v. Ragen,* 337 U.S. 235 (1949); *Madden v. Kentucky,* 309 U.S. 83 (1940); *Henry v. Mississippi,* 379 U.S. 443 (1965). Here, no federal questions are involved.

In fact, other than in a supplemental petition for rehearing filed in the Kentucky Court of Appeals, the record does not affirmatively indicate that the federal questions now raised were presented in any fashion to the state courts.[1] Moreover, a comparison of the federal questions now presented with the record indicates that those issues now raised would not have been necessary to the determination of the cause before the Kentucky Court of Appeals. Here, the decision of the Kentucky Court of Appeals was rendered without deciding, or without meaning to decide, the federal questions now presented to this court. *Southwestern Bell Telephone Co. v. State of Oklahoma,* 303 U.S. 206 (1938); *People of New York, ex rel Con-*

1/ The respondent, under separate cover, has lodged a certified copy of the state court record with the Clerk of the Supreme Court.

solidated Water Co. of Utica v. Maltbee, 303 U.S. 158 (1938).

Finally, certiorari jurisdiction is completely discretionary under Rule 19 and the respondent submits that the petition for writ of certiorari should be dismissed since the issues raised in the petition neither arise under such exceptional circumstances to require review of the decision of the Kentucky Court of Appeals nor present any federal questions, much less substantial federal questions, as would merit the discretionary exercise of this Court's review by certiorari. *Department of Mental Hygiene v. Kirchner,* 380 U.S. 194 (1965); *Cardinale v. Louisiana,* 394 U.S. 437 (1969).

SUMMARY

In summary, the respondent submits that the petitioner's application for writ of certiorari should be denied because it fails to meet the jurisdictional requirements of Title 28 U.S.C. § 1257(3). The purpose of review by writ of certiorari is not to give the defeated party another hearing, yet in the instant case the arguments set out in the petition are nothing more than a rehash of contentions previously presented relating to state law in the state trial and appellate courts. Only now those arguments are clothed in allegations of federal constitutional deprivations. As previously pointed out, these federal questions were raised too late to preserve those issues on certiorari review. Moreover, even if those issues had been properly preserved they do not constitute substantial federal questions as would require certiorari review. Nor has the peti-

tioner set out sufficient grounds in the petition as to justify the discretionary exercise of the jurisdiction of this Court under Rule 19.

The respondent will now endeavor to respond to each of the three contentions raised by the petitioner as though said contentions were properly before the Court, even though respondent maintains they are not.

STATUTORY PROVISIONS INVOLVED
KENTUCKY REVISED STATUTES 433.220

Any person guilty of larceny of money or other property of the value of one hundred dollars or more shall be confined in the penitentiary for not less than one nor more than five years. Any person who unlawfully takes, drives or operates a vehicle without the knowledge and consent of the owner shall be subject to the same punishment.

COUNTERSTATEMENT OF THE CASE

At approximately 1:30 a.m. on the morning of August 22, 1973, Mr. Carroll Bevarly, the owner of Smith's Grove Drugstore located on Main Street in Smith's Grove, Warren County, Kentucky, was awakened by the burglar alarm device located in his drugstore. (Transcript of Evidence, hereinafter TE, 75-77). Mr. Beverly's house is located four and one-half blocks from the drugstore and the latter building is equipped with a burglar device which sets off an alarm in Mr. Bevarly's home when activated. After awakening his wife, who proceeded to call the police, Bevarly immediately dressed, armed himself with a 12 gauge shotgun, and proceeded to his drugstore where

he saw three men on the roof of the building. (TE, 77-81, 96). However, it was so dark that he was unable to identify them other than as to their size.

Bevarly fired one warning shot whereupon the three men on the roof attempted an immediate descent to the ground. Two of the men jumped off the roof from the side of the building opposite from where Bevarly was standing and upon doing so they left bootprints at the spot where they hit the ground. (TE, 82-83). The third man, Eugene Byrns, had the misfortune of jumping off the roof and landing almost at the feet of Mr. Bevarly (Byrns left no bootprints because he was wearing several pairs of socks and no shoes). Although he attempted to flee, he ceased to do so upon threat of being shot by Mr. Bevarly. (TE, 84-86). Bevarly guarded Byrns with his shotgun until the subsequent arrival of the police 15 minutes later who placed Byrns under arrest.

Upon arrival at the scene of the crime by the police officers, Bevarly told them that there had been three men involved and two were still at large. (TE, 152). Several of the officers began searching the grounds and one, Police Chief Denham of Smith's Grove, got into his automobile and drove around the town looking for the two criminals. (TE, 131). As Chief Denham proceeded through the town he saw a car turn a corner and approach him (approximately two blocks away), suddenly switch off its lights, and pull into a driveway. (TE, 132). The occupant of the car got out and walked around to the rear of a nearby house. Chief Denham immediately drove up to the parked car and flashed a spotlight on the driver who was now standing in the back yard of this residence. Upon

request, the driver (the petitioner herein) approached the Chief's car and explained that he had stopped to get some water for his automobile which he claimed was overheated. However, the car, a Chevrolet Impala, did not appear overheated in that it was not steaming nor did a subsequent check of the radiator reveal a low water level. (TE, 133, 138, 161, 163). The petitioner stated that he had just gotten off I-65 and could not find an open service station. However, an all night service station, which is fully lit at all times, is located just off the I-65 exit near Smith's Grove. (TE, 171). Leaving the Chevrolet there, Chief Denham brought the petitioner back to the drugstore in his police car and turned him over to Deputy Sheriff Glenn Wood who was supervising the investigation of the crime.

From this investigation it appeared that entry into the drugstore had been accomplished by chopping a hole in the roof. (TE, 152-155). Also, a search of Byrns revealed that he had a huge quantity of narcotics in his possession which had been taken from the store. Deputy Sheriff Wood then asked the petitioner and Byrns if they knew one another but both denied ever having had the pleasure. However, Officer Wood compared the petitioner's boots to a set of prints found near where the burglars had landed after jumping off the roof. The prints matched the soles of the petitioner's boots and he was placed under arrest. Also, a key found in the possession of Byrns when he was searched was turned over to Chief Denham who was told to return to the Chevrolet Impala to see if it would fit in the ignition. Denham returned to the Chevrolet, opened the door, *reached in* and placed the key in the ignition and found that it did fit. As he was

testing the key, Chief Denham noticed two men's billfolds which were on the floor of the car and partially hidden under the front passenger seat. (TE, 133, 134). He took these billfolds back to Deputy Sheriff Wood. Wood inspected the billfolds and found that one belonged ot Byrns and the other to a person named James Stillwell. The petitioner was subsequently indicted and tried on charges of grand larceny and storehouse breaking.

The petitioner plead not guilty and did not testify in his own behalf at trial. On December 13, 1973, a jury in the Warren Circuit Court in Warren County, Kentucky, returned a verdict of guilty as to the grand larceny charge and fixed the petitioner's punishment at five years imprisonment. (Transcript of Record, hereinafter TR, 19). Judgment was entered pursuant to the jury's verdict on December 21, 1973, and was affirmed on appeal to the Kentucky Court of Appeals in a Memorandum Opinion rendered on October 25, 1974. (TR, 28). The petitioner now seeks review of the aforementioned Opinion by way of a petition for writ of certiorari to this Honorable Court.

ARGUMENT

I.

THE CIRCUMSTANTIAL EVIDENCE PRESENTED AT TRIAL BY THE PROSECUTION WAS MORE THAN SUFFICIENT TO SUPPORT THE PETITIONER'S CONVICTION OF GRAND LARCENY; THUS, NO SUBSTANTIAL CONSTITUTIONAL QUESTION IS PRESENTED NOR IS THERE A CONFLICT AMONG THE VARIOUS STATE AND FEDERAL JURISDICTIONS.

The petitioner was indicted for the offenses of storehouse breaking and grand larceny, as proscribed by KRS

433.190 and 433.220. (Transcript of Record, hereinafter TR, 2). Upon conviction on the grand larceny charge, the petitioner alleged on appeal to the Kentucky Court of Appeals that there was insufficient evidence to sustain such conviction for grand larceny. In rejecting this contention the Kentucky Court of Appeals indicated "that the evidence was sufficient to sustain the conviction." The petitioner now seeks review by certiorari and clothes this contention with the allegation that his right to due process of law has been violated. He also urges a conflict in the decisions among the various federal and state jurisdictions in regard to the issue now in question. The respondent disagrees.

KRS 433.220 reads as follows:

> *"Any person guilty of larceny of money or other property of the value of one hundred dollars or more shall be confined in the penitentiary for not less than one nor more than five years.* Any person who unlawfully takes, drives or operates a vehicle without the knowledge and consent of the owner shall be subject to the same punishment." (Emphasis ours).

Under Kentucky law, the elements of the aforementioned offense are as follows:

"1. Taking and carrying away

2. Money or other property of another

3. Of the value of $100 or more

4. With intent to steal it,

5. Venue." *Russell's Kentucky Practice,* Vol. 1, Part 3, Page 15.

As this Court is aware, the mere fact that the prosecution's evidence may be totally circumstantial is not relevant to a determination of whether that evidence is sufficient to support a guilty verdict. Circumstantial evidence which convinces a jury beyond any reasonable doubt is sufficient to sustain a conviction. *Holland v. United States,* 348 U.S. 121 (1954). Although the petitioner vigorously urges that the prosecution failed to prove all of the elements of the offense charged, oddly enough the petitioner fails to make specific mention of precisely what element or elements the prosecution failed to prove. Under Kenutcky law, in essence, the elements of larceny consist of a taking of and asportation of property of another by trespass with a felonious intent to permanently deprive the owner of his property. *Hunt* v. *Commonwealth,* Ky., 338 S.W.2d 912 (1960); *Wombles* v. *Commonwealth,* Ky., 317 S.W.2d 169 (1958).

Admittedly, the prosecuiton's case against the appellant was based solely upon circumstantial evidence since there were no eye witnesses as to the actual commission of the crime. However, the offense of grand larceny may be proved by circumstantial evidence. *Eversole* v. *Commonwealth,* Ky., 288 S.W.2d 58 (1956). In the instant case, the incriminating evidence presented by the prosecution established the petitioner's guilt beyond any reasonable doubt. For example, (1) it was established that Mr. Bevarly's drugstore had been broken into during the middle of the night; (2) that hundreds of dollars of merchandise, including watches and drugs, had been carried away (TE, 167-169); (3) Byrns had some of the stolen goods in his possession when he was apprehended; (4) that the petitioner was apprehended within one-half

mile of the scene of the crime; (5) the petitioner was observed pulling off the road, turning off his lights before his engine had stopped, got out of his car, walked to the rear of a residence allegedly looking for water for his overheated car although there was no evidence to indicate that the car was in fact overheated; (6) the petitioner (a stranger in town) had told the officers that he could not find an open service station at which to get water for his car although he would have had to have passed an all night service station which was open when he took the exit off I-65 — the direction from whence he said he had come; (7) when brought to the scene of the crime, he denied knowing Byrns although a key was found in Byrns' possession which also fit the ignition of the Chevrolet automobile which the appellant was driving that night (TE, 121-124); (8) moreover, two wallets were found in the Chevrolet automobile — one belonging to Byrns and the other to a man, James Stillwell; (9) two witnesses testified that they saw three men in the drugstore and thereafter on the roof attempting to flee and it appears that the petitioner, Byrns, and an unknown person were these three men; (10) two separate sets of bootprints were found at the spot where two men jumped from the roof of the drugstore and witnesses for the prosecution testified that one of those sets of prints was very similar to the prints of the boots worn by the petitioner (TE, 118, 161); (11) also, two identical books of matches were found, one in the possession of Byrns and the other in the possession of the petitioner at the time they were arrested.

In light of the foregoing, it is obvious that there was ample evidence to support the jury's belief beyond any

reasonable doubt as to the guilt of the appellant. *Hollowell* v. *Commonwealth*, Ky., 492 S.W.2d 884 (1973). Thus, the conviction shoud be upheld. *Shelton v. Commonwealth*, Ky., 484 S.W.2d 95 (1972); *Faughn* v. *Commonwealth*, Ky., 453 S.W.2d 743 (1970); *Winn* v. *Commonwealth*, Ky., 303 S.W.2d 275 (1957).

Finally, the petitioner asserts that there is a conflict of decisions in regard to the issue at bar and, for this reason too, urges that certiorari review should be granted. However, for the reasons previously set out in the Jurisdictional Statement and in this argument, the respondent submits that the petitioner has failed to demonstrate the existence of any real conflict of decisions in state and/or federal courts pertaining to the issue now presented. An examination of this contention clearly indicates that there exists no such conflict nor does it reveal any alleged violation of the constitutionally protected right to due process of law — an allegation raised too late to be a basis for certiorari review. The petition should be denied.

II.

THE SEARCH OF THE AUTOMOBILE DRIVEN BY THE PETITIONER DOES NOT PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION PERTAINING TO HIS FOURTEENTH AMENDMENT DUE PROCESS RIGHT TO A FAIR TRIAL.

The petitioner maintains that the police made an illegal search of the automobile which he had been driving on the night of his arrest. He further alleged that the admission into evidence of two wallets found in the automo-

bile over his motion to suppress, violated his constitutional right to a fair trial. Respondent disagrees.

As previously set out in the Jurisdictional Statement, the constitutional issue now presented was not properly raised in the state courts and thus review by certiorari is unwarranted here. In any event, the precise question presented under the facts of the case at bar is neither novel, unsettled, or reflective of a conflict of decisions between jurisdictions, nor does the law in this matter require a change in the law or warrant further consideration. Moreover, the petitioner has failed to establish in what manner the decision by the Kentucky Court of Appeals is at variance with any prior decision of this Court, nor has he established that this state court has ruled upon a substantial federal question not heretofore decided by this Honorable Court. Under these circumstances certiorari jurisdiction simply does not exist.

The Kentucky Court of Appeals indicated that "the search was valid." (Petitioner's Appendix 1A). Respondent would point out that there is no indication whatsoever that the court based its opinion on federal law in regard to the search and seizure. This issue could have been resolved under state law since the Fourth Amendment of the United States Constitution and Section Ten of the Constitution of Kentucky are of similar import. Furthermore, the concept of due process of law, vouchsafed to all citizens under the Fourteenth Amendment of the United States Constitution is similarly vouchsafed to the citizens of Kentucky by the Bill of Rights of the Constitution of Kentucky, Section Fourteen. See *O'Brien* v. *O'Brien*, 294 Ky. 793, 172 S.W.2d 595, 609 (1943).

Mere recitation of United States Supreme Court authority in petitioner's state court briefs is insufficient, per se, to raise a federal question or establish certiorari jurisdiction since such jurisdiction cannot be founded by surmise. *Lynch* v. *New York ex rel Pierson*, 293 U.S. 52 (1934). Therefore, the respondent submits that the Kentucky Court of Appeals opinion in regard to the allegedly illegal search and seizure was, in essence, a state decision and not based upon federal law. Simply stated, petitioner has failed to establish, or preserve for review any issue pertaining to alleged violations of federal constitutional rights.

Secondly, the facts in the instant case indicate that the automobile in question was registered in the name of a Mr. Walton from Jefferson County, Kentucky. (Transcript of Evidence, 176). In fact, nowhere in the record does there appear an affirmative allegation on the part of the petitioner that he had any possessory or proprietary rights or any other indicia of ownership in the automobile which was the subject of the search and the source of the seized evidence. Petitioner does not maintain that he owned the automobile, leased it, or borrowed it. Under these circumstances, the respondent maintains that the petitioner does not have standing to raise the issue of an alleged illegal search and seizure of that automobile. *Iles v. Commonwealth*, Ky., 476 S.W.2d 170 (1972); also see *United States v. Brown*, 452 F. 2d 868 (6th Cir. 1971).

Thirdly, this Court has made a very definite distinction in the law of search and seizure between house, office, and storehouse on one hand and motor vehicles on the

other. *Carroll* v. *United States,* 267 U.S. 132 (1925). If exigent circumstances exist in the reasonable judgment of the police officer as to probable cause, a predicate sufficient to authorize a search comes into existence. *Chambers* v. *Maroney,* 399 U.S. 42 (1970). The facts in the case at bar as reflected in the Counterstatement of the Case, were sufficient to permit a search of the automobile by Chief Denham. For instance, the police had been advised that three men had participated in the breakin which had occurred only minutes earlier. By the time Denham returned to the automobile two men were under arrest for the robbery, Byrns and the petitioner, and *one was still at large.* When Denham opened the car door, reached in, and placed the key found on Byrns in the ignition, and started the automobile, there was even more justification to search the automobile immediately because this fact, along with several others, was more than sufficient to implicate the petitioner in the offense which had previously been perpetrated Moreover, it is most certainly conceivable that the third man who was still at large, or some passerby, could have whisked the automobile away in the dead of night or taken or destroyed the contraband or whatever incriminatory evidence the car may have contained. Also, at the time Denham returned to the automobile it was not known by the police whether all the items stolen from the drugstore had been recovered. It was possible that contraband could have been hidden in the automobile. This fact, in and of itself, would have justified an immediate search of the vehicle. *United States v. Gargotto,* 476 F. 2d 1009 (6th Cir. 1973); *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971); *Chambers* v. *Maroney,* supra. Lastly, it should be kept in mind that the wallets were seized not

as a consequence of a "search" in the common sense, but because Denham, upon reaching into the car to place the key in the ignition observed the two wallets protruding from under the front seat. The law of search and seizure is based upon "reasonableness." And, under the facts of this case, the petitioner has failed to establish that his federal constitutional rights were violated by the actions of the police on the night he was arrested.

III.

PETITIONER'S DUE PROCESS RIGHTS TO A FAIR TRIAL WERE NOT VIOLATED BY THE ADMISSION INTO EVIDENCE OF PHOTOGRAPHS OF ONLY ONE SET OF BOOTPRINTS.

The Kentucky Court of Appeals also rejected the petitioner's contention that he was denied a fair trial due to an alleged failure of the Commonwealth to allow discovery of crucial evidence. This contention was predicted upon photographs which did not turn out of two pair of bootprints left at the scene of the crime and which were not introduced into evidence at the trial. Petitioner presents this same issue to this Honorable Court with the additional allegation of a violation of federal constitutional rights. However, perusal of petitioner's argument establishes no violation of federal rights was ever timely raised in the state courts. More significantly the contention presented for consideration is not one which would merit certiorari review in any event.

The petitioner's due process rights to a fair trial were not violated by the admission into evidence of photographs of only one set of bootprints.

Petitioner's allegation that he was denied access to certain unclear photographs of unclear bootprints is inconsequential. Perusal of the prosecution's evidence indicates that *two sets* of bootprints were found at the spot where two men landed after jumping off the roof of the drugstore. One set of prints was well set into the ground, clearly distinguishable, and easily photographed. Two photographs of this particular set of bootprints were made by the mobile crime lab and subsequently introduced into evidence at trial along with numerous other photographs of the drugstore, the hole torn in the roof of the building, and other companion photographs dealing with the crime.

No photographs were introduced as evidence of the *second set of bootprints* because they were not well set in the ground, not clearly distinguishable and the photographs of those prints did not turn out. Therefore, these photographs were not kept nor were they used as evidence at trial, and obviously not presented for inspection to the defense nor for that matter the jury. *However, it was this set of prints that was similar to the soles of the petitioner's boots.* (TE, 118, 161). This was established not by the photographs, but by eyewitness testimony.

This situation is somewhat analogous to dusting for fingerprints, which did occur in this case. For instance, when such dusting reveals prints of the accused these are documented, samples are taken as exhibits, and may become subject to procedural discovery pursuant to Kentucky Criminal Rules and thereafter they may be presented as evidence at trial to the jury and court. However, where dusting for fingerprints reveals only smudges or undefined prints (as happened in this case), these samples are not

kept since they are of no value and will not be used at trial, and of course are not subject to procedural discovery.

At the trial no prosecution witnesses testified that the *photographs* introduced into evidence of a set of bootprints were those belonging to the petitioner. In fact, the contrary is true. Thus if there is any issue at all as to the probity of the prosecution's witnesses concerning their personal identification and comparison of the petitioner's boots to one of the two sets of bootprints found at the scene of the crime, it was a matter for the jury to determine. Moreover, no proper objection was made by the petitioner insofar as these "unclear photographs of unclear boot prints." Even if such an objection had been made the respondent submits that it would have been improper since these photographs were in fact unclear, revealed nothing, were not used or introduced at the trial and were of no consequence. Again, the testimony of witnesses at the scene who identified and matched the petitioner's boots to those bootprints which were found was proper and its relevancy, weight and credibility were matters for the jury. *Webb Transfer Lines, Inc.* v. *Taylor,* Ky., 439 S.W. 2d 88 (1969); *Hayes* v. *Hayes,* Ky., 357 S.W.2d 863 (1962). Therefore, the respondent submits that this contention, obviously not a basis for reversal of the petitioner's conviction under state law, is equally without merit as a basis for review by certiorari since it presents no federal constitutional questions at all.

CONCLUSION

The issues presented by the petitioner alleging a denial of federally protected constitutional rights have not been raised in the state courts below and thus are not a basis for the granting of certiorari review. Moreover, these same issues do not constitute or raise a substantial federal question. Nor do any of those issues involve any real conflict of decisions between or among other state or federal courts. For the foregoing reasons, the respondent respectfully submits that the petitioner has failed to meet the jurisdictional requirements of 28 U.S.C. § 1257(3) and requests that the petition for writ of certiorari be dismissed.

Respectfully submitted,

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PROOF OF SERVICE

I, Patrick B. Kimberlin, III, one of counsel for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 30th day of June, 1975, I served the petitioner with Brief for Respondent in Opposition to Petition for Writ of Certiorari, by placing 3 copies of the same in the United States mail, first class postage prepaid, and addressed to Hon. J. Marshall Hughes, WHITE & HUGHES, 439 Park Row, Executive Building, Bowling Green, Kentucky 42101, Counsel for Petitioner.

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